

EPA-838

Palmer Hough/DC/USEPA/US

12/15/2010 08:51 AM

To Denise Keehner, David Evans, Brian Frazer, Heidi Karp, Kevin Minoli, Christopher Hunter, Julia McCarthy, Ross Geredien, Michael Szerlog, Richard Parkin, Tanya Code, Jim Pendergast, Ann Campbell

cc Phil North

bcc

Subject 12-14-10 letter from Bristol Bay Native Corporation to Administrator Jackson - follow-up to BBNC's August request for EPA advance 404(c) action in Bristol Bay

Folks:

Yesterday the Bristol Bay Native Corporation (BBNC) sent LPJ a letter following up on its August 2010 request that EPA use its 404(c) authority to protect sensitive headwater areas of the Bristol Bay from a large-scale copper/gold mine proposed by the Pebble Limited Partnership. The letter notes that adequate scientific and technical information exists to initiate a 404(c) review and urges EPA to do so now.

Interestingly, the letter also responds to a number of the issues raised in the letter EPA received from the Governor of Alaska which urged EPA to *not* initiate a 404(c) action at this time. According to BBNC, the arguments laid out by the Governor actually support BBNC's request for an advance 404(c).

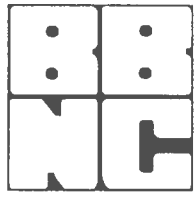
Thanks, Palmer



BBNC EPA 121410.pdf

Palmer Hough, Environmental Scientist
tel: 202.566.1374 | fax: 202.566.1375

Wetlands Division
U.S. EPA Headquarters (MC 4502T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460
www.epa.gov/wetlands



Bristol Bay Native Corporation

Enriching Our Native Way of Life

111 West 16th Avenue, Suite 400 / Anchorage, Alaska 99501 / (907) 278-3602 / Fax (907) 276-3924

December 14, 2010

The Honorable Lisa Jackson
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Ariel Rios South Building
Washington, DC 20460

Re: Application of Clean Water Act Section 404(c) to prohibit certain lands in the headwaters of the Kvichak and Nushagak Rivers from use as a disposal site for dredged or fill material.

Dear Administrator Jackson:

In August of this year, the Bristol Bay Native Corporation (BBNC) requested that EPA use its authority under Clean Water Act Section 404(c) to carefully tailor a prohibition of the discharge of dredged or fill material from the potential Pebble mine deposit at the headwaters of the Kvichak and Nushagak Rivers in the Bristol bay region of Southwest Alaska. The request was based on known information about the size of the Pebble ore deposit, the type of mining required to develop that resource and the extremely sensitive location in which that deposit rests. These factors combine to create an unacceptable risk from mining to BBNC shareholders, their subsistence-based livelihoods, and the prospects for responsible long-term economic development opportunities for the region.

In the months since our request, you have heard some concerns about the use of the 404(c) process, including from the State of Alaska. Rather than counsel that EPA not initiate a 404(c) process, in our view, the concerns expressed by the State and others support initiation of that process.

The State is concerned that EPA would exercise its 404(c) authority to prohibit discharges over "vast expanses" of State land. Doing so is certainly not in BBNC's vision for the outcome of a 404(c) process. It is the unique environmental circumstances present in the headwaters of the Kvichak and Nushagak Rivers that make those rivers so incredibly productive for salmon, other fish species, and wildlife. Unfortunately, low grade ore deposits underlie this area, the mining of

which would degrade that environment and risk decimation of the very environmental qualities of that specific land that make it so productive for salmon. Thus, rather than covering “vast expanses” of land, we believe that an appropriate and scientifically justified use of 404(c) authority would result in targeted protections for this specific region.

The State also emphasizes that EPA should not use its 404(c) authority due to the “tremendous investment” of mining companies in the region, coupled with “the liability and legal challenges that could accompany an unprecedented after-the-fact” 404(c) determination. Rather than counsel that EPA not use its 404(c) authority in the circumstances present here, the dynamic expressed by the State supports EPA’s preemptive use of that authority. This is so for two reasons.

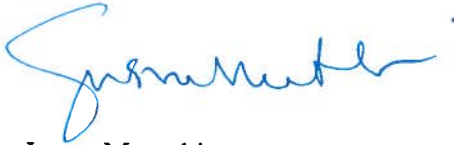
First, this language from the State appears to indicate that the question whether this area is even appropriate for mining has been asked and answered in the State’s land use planning process, and that the mining company’s investment in the area may create enforceable rights to mine or be compensated if such mining is disallowed.¹ Given this apparent position, the remaining laws of the State of Alaska are not well-suited to deal with the threat posed by the proposed Pebble mine, which cannot be ameliorated through permitting standards. In this context, it is especially critical that EPA act to protect the federal interest in preserving water quality – well established in the Clean Water Act and based on the U.S. Constitution.

Further, industry investment in exploration and development plans will only increase. By acting now to clarify what type of activity clearly is inappropriate, EPA would provide certainty to industry before that investment increases.

Others have suggested that it is most appropriate for EPA to engage in this process only after the Pebble Limited Partnership (PLP) applies for a 404 permit. Yet the 404(c) process includes ample opportunity for PLP, and anyone else for that matter, to provide information to EPA on why or how the proposed mine will not present unacceptable adverse effects to 404(c) resources. It is our opinion that credible scientific information exists to demonstrate that those unacceptable adverse effects would occur. And it is in this exact context that Congress anticipated the preemptive use of 404(c) authority for the cost and time efficient certainty it can provide all parties, industry included. Further, BBNC expects and will work to ensure that any such decision be carefully tailored to the threat posed to the Bristol Bay area; a massive hard rock, acid-generating, mine located directly in the headwaters of the Kvichak and Nushagak Rivers. Such a decision is fully supported by EPA’s targeted use of 404(c) authority in other contexts, and a broad prohibition on varied types of fill in the Lake and Peninsula or Bristol Bay Boroughs would not at all be supported by the law or science.

In short, BBNC believes that a carefully tailored 404(c) prohibition would strike the right balance between protecting both environmental and economic interests in the region, and we urge EPA to initiate that process.

Sincerely,



Jason Metrokin
President & CEO
Bristol Bay Native Corporation

¹ Notably, Northern Dynasty Minerals, one of the two entities that make up the Pebble Limited Partnership, does not believe it holds such rights:

The likelihood of future mining at the Pebble Project is subject to a large number of risks and will require achievement of a number of technical, economic and legal objectives, including obtaining necessary mining and construction permits The need for compliance with extensive environmental and socio-economic rules and practices and the requirement for the Company to obtain government permitting can cause a delay or even abandonment of a mineral project.

<http://www.northerndynastyminerals.com/ndm/presentations.asp> (September 10 ppt presentation at Slide 29).

cc: Senator Lisa Murkowski
Senator Mark Begich
Governor Sean Parnell